

**Consideration of preliminary adoption of 312 IAC 11.8 to assist with implementation of P.L. 151-2012, which amended IC 14-25-1-8, pertaining to the mediation of disputes between the users of surface water; Administrative Cause No. 12-060W**

Since 1955, one of the statutes governing surface water quantity rights (today codified at IC 14-25-1) included a section (now IC 14-25-1-8) providing an opportunity for mediation of disputes by the Natural Resources Commission. The section's language had long since become archaic, however, and sporadic inquiries about mediation from interested citizens resulted in decisions not to proceed. Public Law 151-2012 amended IC 14-25-1-8 to modernize and make available access to mediation through IC 4-21.5-3.5 (a chapter of what is commonly called the "Administrative Orders and Procedures Act"). The new legislation left open how the Commission would process a request to participate in mediation.

Proposed 312 IAC 11.8 in Exhibit A would establish a process for participation and assist with the implementation of P.L. 151 and IC 14-25-1-8 as amended. Processing would be through an administrative law judge in the Commission's Division of Hearings with professional and technical functions administered by DNR's Division of Water. Although the scope of orders that may be issued by an administrative law judge is narrow, the orders may be reviewed by the Commission's AOPA Committee and on judicial review to a court. The proposed rule specifies that the opportunity for mediation applies only within the legal scope of agency jurisdiction and only to water quantity disputes. If dispute resolution is available through a local unit of government for a storm water nuisance under IC 36-9-28.7, or through a county drainage board for obstructions in a mutual drain or a natural watercourse under IC 36-9-28.7, resort to those remedies would have to be exercised before seeking Commission mediation. If the dispute is decided by a local unit or a county drainage board on the merits, the dispute would not qualify for mediation. If mediation is conducted and results in a settlement, the agreement could be made a binding document among the parties. The DNR is not required to participate, but if the DNR participates and a settlement results, an agreed order could be approved and become a final agency action of the Commission in addition to a party agreement. If an agreement is not reached through mediation, the administrative law judge would dismiss the proceeding.

Proposed 312 IAC 11.8 is presented for action as to preliminary adoption.

**Exhibit A**

**ARTICLE 11.8. SURFACE WATER DISPUTES MEDIATION**

**Rule 1. Administration and Implementation**

**312 IAC 11.8-1-1 Administration**

Authority: IC 14-10-2-4; IC 14-25-1-8; IC 14-25-1-11

Affected: IC 14-25-1

Sec. 1. (a) The commission's division of hearings shall administer and coordinate application of IC 4-21.5, including the use of mediation under IC 4-21.5-3.5 for a dispute that arises between the uses of surface water in a watershed area.

(b) The department's division of water shall administer and coordinate the professional and technical functions required of the department under IC 14-25-1 and this rule. The division of water may provide professional and technical assistance to parties to assist with achieving a resolution of a surface water dispute. *(Natural Resources Commission; 312 IAC 11.8-1-1)*

**312 IAC 11.8-1-2 Initiation of petition for mediation**

Authority: IC 14-10-2-4; IC 14-25-1-8; IC 14-25-1-11

Affected: IC 14-25-1

Sec. 2. To seek mediation under IC 14-25-1-8 for a dispute between the users of surface water in a watershed area, an affected person must file a petition under this rule at the following address:

**Division of Hearings**

**Natural Resources Commission**

**Indiana Government Center North**

**100 North Senate Avenue, Room N501**

**Indianapolis, IN 46204-2200**

*(Natural Resources Commission; 312 IAC 11.8-1-2)*

**312 IAC 11.8-1-3 Contents of petition for mediation**

Authority: IC 14-10-2-4; IC 14-25-1-8; IC 14-25-1-11

Affected: IC 14-25-1

Sec. 3. A petition filed under section 2 of this rule must include the following information:

- (1) Location of the dispute, including reference to an affected watershed.
- (2) Names and addresses of persons believed necessary to resolve the dispute.
- (3) Identification of the harm caused by human activity which results from a change in surface water quantity.
- (4) Except as provided in subdivision (5), citation to a statutory section or sections of IC 14-25 through IC 14-29 that places jurisdiction in the department over the subject matter of the dispute. The petition must specify how the section or sections would authorize relief from the harm asserted in subdivision (3).
- (5) For mediation of a dispute arising under IC 14-26-2, 312 IAC 11 applies.
- (6) A showing the petitioner does not have an adequate remedy under IC 36-9-27.4 or IC 36-9-28.7. The showing is not met if the petitioner sought but was denied relief on the merits.

*(Natural Resources Commission; 312 IAC 11.8-1-3)*

**312 IAC 11.8-1-4 Conduct of proceeding and mediation**

Authority: IC 14-10-2-4; IC 14-25-1-8; IC 14-25-1-11

Affected: IC 14-25-1

**Sec. 4. (a) Following the receipt of a petition, an administrative law judge shall be appointed to conduct a proceeding under IC 4-21.5.**

**(b) As soon as practicable following appointment, the administrative law judge shall schedule a prehearing conference and notify each of the following:**

- (1) The petitioner.**
- (2) Persons identified by the petitioner in section 3(2) of this rule.**
- (3) The department.**

**(c) The administrative law judge shall conduct a preliminary hearing under IC 4-21.5-3-7(c) to determine whether the petition satisfies the requirements of section 3. The preliminary hearing may be conducted in conjunction with the prehearing conference scheduled under subsection (b). The petitioner has the burden of going forward with the evidence. For purposes of the preliminary hearing, section 3 is satisfied if the evidence is viewed in the light most favorable to the petitioner. Following the hearing, the administrative law judge shall issue an order that includes a statement of the facts and law on which it is based. If the order denies the petition, the order shall be designated as a nonfinal order and is subject to IC 4-21.5-3-29.**

**(d) Each of the persons identified in subsection (b), and any other person identified and joined by the administrative law judge as a party needed for just adjudication, is a party to the proceeding.**

**(e) The parties may agree upon a person to serve as mediator. In the absence of an agreement, the administrative law judge shall seek to cause the appointment of a mediator who is qualified under IC 4-21.5-3.5.**

**(f) Following consultation with the parties and the conduct of any mediation, the mediator shall report to the administrative law judge either:**

- (1) under IC 4-21.5-3.5-21; or**
- (2) the parties have settled.**

**(g) If an agreement is not achieved following a reasonable opportunity to conduct mediation, the administrative law judge shall order the proceeding dismissed.**

**(h) The department is not required to attend a preliminary hearing or a mediation session. If the department attends a mediation session, the session shall be conducted in Marion County unless the department otherwise agrees.**

**(i) If an agreement is achieved, the parties may enter either of the following:**

**(1) A private agreement and request the administrative law judge to dismiss the proceeding. The parties may enter an agreement under this subdivision without participation by the department.**

**(2) A proposed agreed order for approval by the administrative law judge and the commission. An agreed order constitutes a final agency action by the commission, as well as a settlement among the parties.**

*(Natural Resources Commission; 312 IAC 11.8-1-4)*